

Served: June 23, 1992

NTSB Order No. EA-3590

UNITED STATES OF AMERICA  
NATIONAL TRANSPORTATION SAFETY BOARD  
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD  
at its office in Washington, D.C.,  
on the 29th day of May, 1992

BARRY LAMBERT HARRIS,  
Acting Administrator,  
Federal Aviation  
Administration,

Complainant,

SE-9695

v.

ROBERT W. DERROW,

Respondent.

OPINION AND ORDER

Respondent has appealed from the oral initial decision of Administrative Law Judge John E. Faulk, rendered at the conclusion of an evidentiary hearing on September 8, 1989.<sup>1</sup>

The law judge affirmed an order of the Administrator revoking respondent's commercial pilot certificate and flight instructor certificate for a violation of section 61.15 of the Federal Aviation Regulations ("FAR") and section 609 of

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<sup>1</sup>An excerpt from the hearing transcript containing the initial decision is attached. Respondent appeared pro se at the hearing.

the Federal Aviation Act of 1958.<sup>2</sup>

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<sup>2</sup>Section 61.15 reads in pertinent part, as follows:

"§ 61.15 Offenses involving alcohol or drugs.

(a) A conviction for the violation of any Federal or state statute relating to the growing, processing, manufacture, sale, disposition, possession, transportation, or importation of narcotic drugs, marihuana, or depressant or stimulant drugs or substances is grounds for -

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(2) Suspension or revocation of any certificate or rating issued under this part."

Section 609(c), dealing with "Transportation, Distribution, and other Activities Related to Controlled Substances," states, in pertinent part:

"(c)(1) The Administrator shall issue an order revoking the airman certificates of any person upon conviction of such person of a crime punishable by death or imprisonment for a term exceeding one year under a State or Federal law relating to a controlled substance (other than a law relating to simple possession of a controlled substance), if the Administrator determines that (A) an aircraft was used in the commission of the offense or to facilitate the commission of the offense, and (B) such person served as an airman, or was on board such aircraft, in connection with the commission of the offense or the facilitation of the commission of the offense. The Administrator shall have no authority under this paragraph to review the issue of whether an airman violated a State or Federal law relating to a controlled substance.

(2) The Administrator shall issue an order revoking the airman certificates of any person if the Administrator determines that (A) such person knowingly engaged in an activity that is punishable by death or imprisonment for a term exceeding one year under a State or Federal law relating to a controlled substance (other than any law relating to simple possession of a controlled substance), (B) an aircraft was used to carry out such activity or to facilitate such activity, and (C) such person served as an airman, or was on board such aircraft, in connection with such activity or the facilitation of such activity. The Administrator shall not revoke, and the National Transportation Safety Board [NTSB] on appeal under paragraph (3) shall not affirm the revocation of, a certificate under this paragraph on the basis of any activity if the holder of the certificate is acquitted of all charges contained in an indictment or information which relate to controlled substances and which arise from such activity.

In his appeal brief, respondent argues that the law judge: 1) erred in allowing the Administrator to amend his charge at the hearing; 2) improperly decided the case before all the testimony had been presented; and 3) relied on respondent's conviction for a crime prohibited by a statute not related to drugs.

The Administrator has filed a brief in reply opposing the appeal and urging the Board to affirm the order of revocation.

After consideration of the briefs of the parties and the record below, the Board concludes that safety in air commerce or air transportation and the public interest require affirmation of the order of revocation. We adopt the law judge's opinion as our own.

Respondent challenges the applicability of FAR section 61.15 in this instance, asserting that he "has not been convicted of a violation of any federal or state statute relating to drugs." He claims that 18 U.S.C. § 1952 (the statute under which respondent pleaded guilty in federal

(..continued)

(3) Prior to revoking an airman certificate under this subsection, the Administrator shall advise the holder thereof of the charges or any reasons relied upon by the Administrator for his proposed action and shall provide the holder of such certificate an opportunity to answer any charges and be heard as to why such certificate should not be revoked. Any person whose certificate is revoked by the Administrator under this subsection may appeal the Administrator's order to the [NTSB] and the Board shall, after notice and a hearing on the record, affirm or reverse the Administrator's order. In the conduct of its hearings, the [NTSB] shall not be bound by findings of fact of the Administrator...."

district court) does not relate to drugs.<sup>3</sup> We disagree with respondent's narrow interpretation of the statute. Through the testimony of an FBI special agent, it was revealed that respondent was convicted under section 1952 for his involvement as pilot for a drug trafficking enterprise that planned to smuggle marijuana between Jamaica and the United States.<sup>4</sup> Inasmuch as section 1952 specifically includes a

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<sup>3</sup>18 U.S.C. § 1952 (1984) states:

"§ 1952. Interstate and foreign travel or transportation in aid of racketeering enterprises

(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to -

- (1) distribute the proceeds of any unlawful activity; or
- (2) commit any crime of violence to further any unlawful activity; or
- (3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than \$10,000 or imprisoned for not more than five years, or both.

(b) As used in this section 'unlawful activity' means ... any business enterprise involving ... narcotics or controlled substances...." (Emphasis added.)

<sup>4</sup>The FBI agent testified that respondent said marijuana had been hurriedly loaded onto the aircraft in Jamaica. Respondent further related to the agent that, because the weight of the parcels was erroneously concentrated at the tail of the aircraft, it could not get the lift necessary for successful takeoff. Through his own testimony, respondent corroborated that he was, in fact, pilot-in-command of the aircraft involved in this incident and had been forced to crash-land in a swamp near the air strip, but claimed that he did not know what was in the packages that had been loaded onto the aircraft.

business enterprise involving "narcotics or controlled substances" as a proscribed unlawful activity, it clearly provides an adequate basis for the order revoking respondent's commercial pilot certificate and flight instructor certificate under FAR section 61.15 and section 609(c) of the Federal Aviation Act.<sup>5</sup>

Respondent also claims that he was unfairly prejudiced when the law judge allowed the Administrator to correct an error in the complaint at the hearing without giving respondent prior notice. Before amendment, the complaint alleged that "[t]he conduct that resulted in the above convictions involved the operation of an aircraft carrying marijuana between Jackson, Mississippi and Jamaica." (Emphasis added.)

The highlighted portion of the complaint was modified to read "from Jamaica to Mainland U.S.A. or Camden, Alabama." It is our opinion that this change did not affect respondent's

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<sup>5</sup>Respondent argues that the Administrator's complaint should be dismissed under the stale complaint rule, 49 C.F.R. § 821.33. This assertion is wholly without merit, as "[t]he stale complaint rule does not apply to charges in a complaint that call in question an airman's qualifications." Administrator v. Anderson, 5 NTSB 564, 566 (1985). Smuggling drugs in an aircraft "is an offense which demonstrates lack of qualification and warrants revocation." Administrator v. King 4 NTSB 1311, 1312 (1984). Hence, the stale complaint rule does not apply in this instance.

Under section 609(c), the Board's review authority is limited to affirming or reversing the Administrator's order. If a respondent was convicted of violating a statute relating to drugs and section 609(c) applies, then revocation is mandatory. See Administrator v. Rawlins, 5 NTSB 2036 (1987), aff'd Rawlins v. NTSB, 837 F.2d 1327 (5th Cir. 1988).

ability to prepare or present his case. He pleaded guilty in federal district court to violating section 1952, and was well aware of what incident the Administrator was referring to in the complaint. No prejudice resulted from the law judge allowing this minor correction at the hearing.

Respondent maintains that he was denied a fair hearing, claiming that the law judge made up his mind before any evidence had been produced. The only allegation respondent disputed, however, was whether he knew drugs had been loaded onto the aircraft.<sup>6</sup> Clearly, the purpose of the hearing was not to relitigate the criminal charge. The law judge did not err in considering respondent's guilty plea under section 1952 as compelling evidence in the case before him. Respondent testified that he had pleaded guilty and, regarding the incident referred to in the complaint, admitted he had flown an airplane in Jamaica that crash-landed shortly after takeoff. It was revealed through the testimony of the FBI agent that respondent's conviction resulted from his involvement in a drug-trafficking enterprise. To reach a determination, the law judge based his conclusion, in part, on an assessment of credibility after hearing both witnesses testify. We see no reason to disturb his findings.

Finally, respondent argues that the law judge refused to grant him subpoenas for two witnesses crucial to his defense

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<sup>6</sup>Respondent insists that, although he pleaded guilty to violating section 1952, he did not know that illegal drugs were aboard his aircraft. See supra, note 4.

and thus deprived him of the ability to adequately present his case.<sup>7</sup> Through the testimony of these witnesses, respondent sought to prove that he had pleaded guilty under the impression that his airman certificates would not be revoked.

The law judge did not abuse his discretion by granting motions to quash the aforementioned subpoenas. A Memorandum of Understanding, which detailed the terms of respondent's agreement to plead guilty to a violation of section 1952(a) and to cooperate with the U.S. Attorney, was admitted into evidence. It was signed by respondent, his attorney, and the assistant U.S. Attorney. The document states that the U.S. Attorney for the Southern District of Mississippi "will seek no further prosecutions" of respondent for any acts relating to the incident surrounding the section 1952 charge. There is no mention of respondent's airman certificates. Respondent maintains that the FBI agent advised him it was unnecessary to have in writing the agreement not to revoke his airman certificates. Yet, respondent did not avail himself of the opportunity to cross-examine the agent about this agreement at the hearing.

The Memorandum of Understanding is plain on its face.

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<sup>7</sup>The witnesses he sought to subpoena were the Assistant Chief Counsel for the FAA's Southern Region and the U.S. Attorney for the Southern District of Mississippi. Respondent also sought a subpoena for the FBI agent who ultimately testified on behalf of the Administrator and was cross-examined by respondent.

It "completely reflects all promises, agreements and conditions made by and between the United States Attorney for the Southern District of Mississippi and Derrow." Further, the law judge determined that respondent's conviction mandated revocation, regardless of what the parties discussed. Respondent maintains that he did not know his airman's certificate would be affected by a guilty plea.<sup>8</sup> We find his argument unpersuasive and determine that he was not deprived of a fair hearing.

**ACCORDINGLY, IT IS ORDERED THAT:**

1. Respondent's appeal is denied;
2. The order of revocation and the initial decision are affirmed.<sup>9</sup>

COUGHLIN, Acting Chairman, LAUBER, KOLSTAD, HART and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.

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<sup>8</sup>It is well-settled that airmen are presumed to be familiar with the Federal Aviation Regulations. See Administrator v. Budar, 3 NTSB 1913, 1914 (1979). In Budar, the respondent unsuccessfully argued that because he was unaware of the consequence, under FAR section 61.15, of pleading guilty to narcotics offenses, the convictions were invalid as a basis for the revocation of his airman certificate.

<sup>9</sup>For the purpose of this order, respondent must physically surrender his certificate to a representative of the Federal Aviation Administration pursuant to FAR § 61.19(f).